

# THE REFORM OF THE EU COURTS (IV)

The Need for a Better Focus on the  
European Court of Justice's Core Mission

FRANKLIN DEHOUSSE



EGMONT

*This report is in memory of Philippe de Schoutete,  
friend, great diplomat, great defender of the European Court of Justice,  
and my best-ever co-author in numerous reflections about Europe.*

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# INTRODUCTION

In recent years, the European Court of Justice (ECJ) has sometimes been accused of judicial activism, especially in Great Britain. This accusation is far from new. In 1993, Margaret Thatcher declared to the House of Lords that ‘some things at the Court are very much to our distaste’.<sup>1</sup> Before that, Michel Debré had even evoked the Court’s ‘pathological megalomania’.<sup>2</sup> From a technical point of view, Rasmussen published a seminal comment in the 1980s,<sup>3</sup> and many others followed. There is now a huge volume of literature on the subject.

It is not surprising that this criticism re-emerges more intensely in a period when both the role of the EU and of the judiciary are increasingly contested in our societies (and when the ECJ has become one of the focal points of the Brexit negotiations). However, there is a new aspect to this debate. A growing number of national supreme courts and academic commentators have begun to criticise the ECJ, not for its activism but for its weak technical competence in some judgments. There is sometimes confusion between these two problems. This report aims to analyse this confusion and to examine possible improvements.

In general, there is little basis for the accusation of activism. Judicial activism itself is an overrated concept, and, in any case, the ECJ is generally quite careful not to engage in it (§§ 1-3). The criticism that the ECJ lacks technical competence seems to have more validity if one reads the academic literature and some national judgments (and sometimes Advocate Generals’ comments). People may confuse this with activism, and the reasons for this confusion are important to understand (§ 4). This question is linked to the need to reform the organisation and management of the Court of Justice of the European Union (CJEU) to satisfy better the needs of litigants, national courts, and, finally, citizens (§ 5).<sup>4</sup>

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<sup>1</sup> 546 PARL. DEB., H.L. (5th ser.) (1993) 560 (UK).

<sup>2</sup> Assemblée Nationale, Sixième Législature, Séance du 1er Juin 1979, 4610 (France).

<sup>3</sup> H. Rasmussen, *On Law and Policy in the European Court of Justice*, Nijhoff, 1986.

For introductory political visions, see R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration*, Palgrave, 1998; S. Saurugger and F. Terpan, *The Court of Justice of the European Union and the Politics of Law*, Palgrave, 2016.

<sup>4</sup> This report is the expanded and updated version of a conference in the CEPS European Labs, February 2017 on the topic of the ECJ’s activism. It follows the author’s three previous reports covering the EU legislative procedure which led to the doubling of the General Court’s judges and cabinets: The reform of the EU courts (I), The need of a management approach, TEPSA/Egmont Paper n° 53, 2011; The reform of the EU courts (II), Abandoning the management approach by doubling the General Court, TEPSA/Egmont Paper n° 83, 2016 and The reform of the EU Courts (III), The brilliant alternative approach of the European Court of Human Rights, TEPSA/Egmont Paper n° 86, 2016. Hereafter referred to as The reform of the EU courts I, II and III.

The Treaties distinguish the CJEU (meaning the institution comprising two courts) and the ECJ (meaning the highest court). Such terminology, which could almost be seen as aiming to create confusion, pays in itself homage to the highest cryptography talents of the judicial drafters of the Lisbon Treaty. Needless to say, it should be improved.

This report concludes that the ECJ needs to focus more on its core function to address the repeated criticism that it has lacked technical competence (or precision) in a noteworthy number of judgments. Basically, in the present system, the ECJ tries to keep control of too many things, and multitasking is an extremely bad management principle for a supreme court. To improve the present situation, it should first develop the use of Advocate Generals' conclusions, as well as information and communication technology (ICT) instruments. After that, the organisation of the CJEU should be reformed to allow the ECJ to concentrate on essential questions. Consequently, returning to a three-layer court system would help considerably. More appeals should be transferred to the General Court, and specialised courts should be more extensively used. This would also improve judicial recruitment, allow more flexibility, and thus boost efficiency, diminish delays, and reduce costs.

This report does NOT aim to provide a detailed analysis of the jurisprudence. It aims to offer a synthetic survey of many comments about many judgments covering many topics. Other examples could certainly be easily found. Such a survey reveals, surprisingly (at least for the author), that many specialists in various domains tend without any coordination to draw similar conclusions about the ECJ jurisprudence's limited technical value in a substantial number of judgments. This should be seen by the European institutions as a very serious call for reflection and reform.

# 1. JUDICIAL ACTIVISM IS A LARGELY OVERRATED CONCEPT

Many speeches, articles, and books have addressed many forms of alleged judicial activism in various systems.<sup>5</sup> In that context, it is interesting first to take a comparative perspective. Two are especially enlightening: the constitutional jurisprudence of the United States and international law jurisprudence.

Since its foundation, the US Supreme Court has been repeatedly accused of judicial activism. Let's remember, for example, the lengthy controversies provoked by Franklin Roosevelt's New Deal programme, during which the Supreme Court blocked many legislative components by reference to a restrictive reading of the interstate commerce clause. Many Democrats, Roosevelt included, believed that it had abused its power. After 1936, the US Supreme Court radically changed its approach. The Court's reading of the interstate commerce clause became more flexible,<sup>6</sup> and the accusations of judicial activism shifted and came from the other political side.

Later came the Warren court and the non-discrimination jurisprudence, and later the Burger court and abortion jurisprudence. This went on till the most recent judicial decisions regarding President Trump's 'muslim ban' and his raving tweets about them. The basic criticism always remains the same.

One can draw at least two lessons from this. One, the accusation of judicial activism has been used many times by many sides throughout US history. In fact, judicial activism is most often a subjective concept depending considerably on the eye of the observer. Two, it explains why, for all important decisions, judges must decide collectively in order to protect the legal system from individual whimsical decisions or easy individual attacks (though recent events indicate that collegiality does not always afford such protection, as in the attack on all UK judges after the judgments in *R. v. Miller*). This collegiality may be strengthened by a balance in the appointment process (political, geographical, religious, and now gender).

This is not exclusive to the United States. The history of international public law indicates that some decisions have been perceived the same way, especially by non-

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<sup>5</sup> A good recent comment concerning the ECJ is M. Dawson ed., *Judicial Activism at the European Court of Justice*, Elgar, 2013.

For a relativist vision, see, for example, A. Grimm, "“This is not life as it is lived here”: The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law", *European Journal of Legal Studies*, 7 (2) 2014.

<sup>6</sup> For a very good comment about this remarkable saga, see J. Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court*, Norton, 2011. A longer-term perspective is offered by G. White, *The Constitution and the New Deal*, Harvard University Press, 2002.

Western observers.<sup>7</sup> Let us recall the example of the International Court of Justice's judgment about the legal personality of the UN and Count Bernadotte. One can also mention the succession of the Barcelona Traction and Sicula judgments, which aimed to define the extent of foreign investors' legal protection. Sometimes sovereignty and frontiers are protected, as in the Fisheries case, and sometimes other values predominate, as in the Asylum case. This is also, by the way, one of the reasons why geographical balance has also been required from the beginning in international courts.<sup>8</sup>

To summarise, lawyers tend to have different readings of the law. This is precisely why we need independent lawyers, acting often collectively, to provide an authoritative reading. They are called judges, and a normal part of their function is thus to surprise at least some of us. One thus needs to be careful with any accusation of judicial activism.

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<sup>7</sup> On this wide topic, see, for example, the excellent conference of T. McWhinney, Judicial activism and the International Court of Justice ([http://legal.un.org/avl/ls/McWhinney\\_CT.html#](http://legal.un.org/avl/ls/McWhinney_CT.html#)); P. Mahoney, 'Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin', *Human Rights Law Journal*, 11 (1-2), 1990, 57; H. Thirlway, 'Judicial Activism and the International Court of Justice' in N. Ando (ed), *Liber Amicorum Judge Shigeru Oda*, 2002, 75; P. Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', *International and Comparative Legal Quarterly*, 56 (4), 2007, 741; F. Zarbiyev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis', *Journal of International Dispute Settlement*, 3 (2), 2012, 247.

<sup>8</sup> See A. Zimmermann ed., *The Statute of the International Court of Justice A Commentary*, Oxford University Press, 2<sup>nd</sup> ed., 2012, 266-267.

## 2. THE EXISTENCE OF EUROPEAN JUDICIAL ACTIVISM IS OVERRATED

Where does this lead us in the debate about European judicial activism? Some critical observers tend to invoke famous judgments from the first decades of the EU: Van Gend & Loos, Costa/Enel, AETR, Cassis de Dijon, etc. ... But were these judgments all that revolutionary?<sup>9</sup>

Let's take Van Gend & Loos and Costa/Enel. To make a correct assessment, we need to put ourselves in the context of the period, 'the mental setting' that was such a fantastic concept developed by James Joll to consider the beginning of the First World War.<sup>10</sup> At the time, there were seven judges, two advocates general, and a few legal secretaries who had to interpret the new EEC treaty. Official documents and political speeches at the time show that the EEC Treaty was designed to compensate for the unsatisfactory results of the intergovernmental approach followed by the Council of Europe. The Treaty was meant to complete the revolutionary experience of the European Coal and Steel Community and to deepen the trade liberalisation already improved by the General Agreement on Tariffs and Trade (GATT).

Additionally, we must take into consideration the wholly exceptional nature of the judicial system established by the Treaties of Paris and Rome. At the time (and this remains largely true now) there was no international judicial system giving individuals a direct right to introduce judicial actions. There was also no international system that contained a system of direct cooperation between an international court and the courts of the Member States. Some authors, like Rasmussen, consider that the founding fathers had envisaged the Court of Justice as a timid actor.<sup>11</sup> This is highly debatable. If so, why did they give the Court many exceptional powers and create many exceptional procedures in comparison to other international agreements?

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<sup>9</sup> A very good bibliography about the European judiciary's alleged activism may be found in V. Hatzopoulos, 'Actively talking to each other: the Court and the political institutions', in M. Dawson, B. De Witte and E. Muir eds., *Judicial activism at the European Court of Justice*, Elgar, 2013, 102-141, notes 2 to 22.

<sup>10</sup> J. Joll, *The Origins of the First World War*, 1st ed., Longman, 1984.

<sup>11</sup> H. Rasmussen, 'The Court of Justice, EC Commission', *Thirty Years of Community Law*, European Perspectives, ed. European Commission Legal Service, 1982, 201.



Taking all these elements into consideration, it does not appear extraordinary that at least the majority of those judges considered that the EEC Treaty had to have some direct effect and some primacy in order to attain its objectives.<sup>12</sup> It is even paradoxical to consider that there has been some heavy judicial activism of an ‘integrationist’ nature in the interpretation of an ‘integrationist’ treaty.

The ECJ is perceived as more activist in some Member States than others due to differences of context. In the United Kingdom, for example, from the enactment of the European Communities Acts onwards, the EU Treaties have generally been presented as creating a free trade area, which was a very incomplete vision. One needs absolutely to read the detailed description of the 1971 ambiguous adhesion debate in the United Kingdom given by Hugo Young in his magnificent, seminal book: *This blessed Plot*.<sup>13</sup> Additionally, there is no judicial control of laws’ constitutionality in the country, so the exercise of such a prerogative by a supranational court may easily appear adventurous.

The same criticisms emanate from France, for different reasons. Historically, the country has always been reticent to permit judicial control of the constitutionality of laws. The French Constitution mentions judicial ‘authority’, not ‘power’. This is no happenstance. Such specific constitutional contexts can colour the analysis of the ECJ judgments.

Nevertheless, there are elements at EU level that can create an impression of judicial activism.

Firstly, the EU, like international society, is a bigger and more heterogeneous beast than a state. In an ensemble of 470 million people, legal cultures and interpretations are more numerous and more varied. Finding a judicial compromise is thus more difficult, and the process of doing so can appear to be a kind of judicial activism.

Secondly, EU law expands and changes very quickly. Between 1985 and 2010, the EU Treaties have undergone five essential revisions<sup>14</sup> with a strong impact on judicial function. The EU has received a steady stream of new competences, for example, in police and justice cooperation, or in private law. Additionally, it is still digesting the

<sup>12</sup> As far as the author’s personal experience goes, he has spent 13 years in the General Court of the CJEU. One may sometimes get the impression of meeting an activist judge (meaning generally s/he is active in defending convictions other than yours) but one never meets an activist court. That’s why we must cherish two basic components of the EU judicial system. The first is its collegiality. Most things are decided collectively, and this improves both the quality and the acceptability of judgments. The second is its diversity. One meets simultaneously people from the EU and national courts, the EU and national administrations, professors and advocates. This is extremely important, and the EU governments should reflect better on that need, in the appointments and the composition of the Article 255 advisory panel.

<sup>13</sup> H. Young, *This blessed plot – Britain and Europe from Churchill to Blair*, Macmillan, 1998.

<sup>14</sup> It was the author’s privilege (or curse) to follow all of them in various capacities. What is amazing is the complete change of appearance, drafting, and volume of the EU Treaties between 1985 (beginning of the Single Act’s negotiation) and 2009 (entry into force of the Lisbon Treaty). This evolution is, of course, bound to have essential consequences for the judges’ function. See F. Dehousse, ‘Quelques réflexions sur l’écriture des Constitutions européennes’, in *Mélanges J.V. Louis, Editions de l’ULB*, 2004, vol. I, 83-94.

multiple consequences of the Charter of Fundamental Rights. Moreover, some fundamental legislation has also been regularly amended. For example, between 1985 and 2010, in the fields of energy<sup>15</sup> as in telecommunications,<sup>16</sup> there have been four successive legislative packages, each introducing fundamental changes. According to Article 19 of the Treaty of the European Union (TFEU), only the EU courts can interpret and apply the Treaties. In such ever-changing circumstances, many things can appear new and surprising, but these result from the changes in the constitutional order or legislative framework, and not from judicial activism.

Thirdly, the EU has become more contradictory than in the past. It thus happens that the authors of treaties and legislations tend to adopt longer texts with conflicting propositions. Article 194 TFEU offers a perfect illustration. It proclaims that ‘Member States keep the control of their policy mix’. Simple minds could deduce from this text that Member States can decide without constraint whether they want to use coal, gas, oil, nuclear, sun, wind, or other renewables. Nothing could be further from the truth. In the framework of climate change policy, the EU can establish targets for renewables (which will thus supplant fossil fuels) or biofuels (which will supplant oil). In the framework of EURATOM, the EU can define higher security norms that will make nuclear power less competitive. In the framework of environmental policy, the EU can impose emissions norms for pollutants (which will thus likely end the use of coal). Additionally, all competition rules apply. When the EU judges come to interpret this complex system, the above-mentioned simple minds may conclude that they have redefined the Treaty rules. The EU courts thus appear to be activists when all they are doing is giving effect to the rather obscure and contradictory will of the Member States and the EU Legislature<sup>17</sup>.

Fourthly, sometimes the EU legislator is unable to find a compromise. It thus tends to reproduce rather humbly (or dumbly?) the existing jurisprudence and leaves the responsibility for finding practical solutions to the judges. A good example of this bad practice is the famous Services Directive where the jurisprudence about freedom of services was simply cut and pasted. Worse happened, as we know, in Declaration 17 of the Lisbon Treaty regarding primacy. In this framework, the Constitution’s authors simply gave a constitutional value to a simple opinion from the Council’s legal service.

Judges are meant, by definition, to define priorities between conflicting interests. They are meant to complete not the interpreted rule itself but its meaning. In such a context, they will always appear as activists to at least some observers.

<sup>15</sup> See F. Dehousse ed., ‘Towards a real European energy policy’, *Studia Diplomatica*, 2, 2007.

<sup>16</sup> See F. Dehousse and T. Zgajewski, ‘The 2003 electronic communications framework: what has happened?’, in T. Zgajewski ed., *New challenges for the information society in Europe*, *Studia Diplomatica*, 3, 2006, 7-46.

<sup>17</sup> See, for example, J. Braun, EU Energy Policy under the Treaty of Lisbon Rules. Between a new policy and business as usual, CEPS, 2011; A. Johnston and E. van der Marel, ‘Ad Lucem? Interpreting the New EU Energy Provision’, *European Energy and Environmental Law Review*, 2013, 181.

But times change and better perspectives are available. We can conclude by returning to the example of US jurisprudence. One can imagine how striking the first seminal judgments from the US Supreme Court (*Marbury v. Madison* and *McCullough v. Maryland*, for example) appeared to those who had spent years negotiating the Articles of Confederation of 1778, and after the Constitution of 1787. Let's re-read Max Farrand's four volumes on the Philadelphia Convention and the excellent book by Bowen aptly titled *Miracle at Philadelphia*.<sup>18</sup> For them, it was something completely new. Now, however, these judgments are seen as the apex of tradition, and not of activism. They were the logical consequence of not only a new text, but a new political philosophy. And so are the first founding judgments of the ECJ.

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<sup>18</sup> C. Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May – September 1787*, Back Bay Books, 1986.

### 3. THE EUROPEAN JUDGE IS, IN ANY CASE, CAUTIOUS

The judgments of the ECJ have become more careful and limited in scope and substance in recent decades. The era of sweeping statements and judgments of principle is over, as a few examples demonstrate.

In cases of asset freezing linked to the fight against terrorism, the ECJ has tried to define a subtle line between the need to protect fundamental rights and to guarantee security. The first judgments of the General Court were seen as giving quite a pronounced priority to security. The Court of Justice seems to have established a more balanced approach. There remain, however, some obscure corners, and some comments indicate that the ECJ finds satisfaction in a predominantly ad hoc approach.<sup>19</sup>

The situation in data retention by telecommunications operators looks quite similar. For example, in the recent *Tele 2 v. Watson* case, the Court of Justice established the principle of protection for personal data but then considered that exceptions could sometimes be tolerated, provided they are limited and motivated.<sup>20</sup>

The same search for a subtle balance still appears in the jurisprudence concerning access to documents. In a first period, the Court of Justice had defined a very strong and general access principle, with a very limited use of exceptions. More recently, for example, in the *Odile Jacob* case, it has given more scope to the exceptions.<sup>21</sup>

The OMT prejudicial ruling also presents similar characteristics. This essential case, strongly contested by some German authorities, concerned European Central Bank (ECB) purchases of unlimited government bonds from Member States in financial difficulty if these states were unable to obtain sustainable interest rates in open financial markets. Theoretically, the ECJ has given a wide definition to the ECB's powers. However, concretely, it has picked out some elements while indicating that

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<sup>19</sup> See, for example, M. Avbelj, F. Fontanelli and G. Martinico, *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, Routledge, 2014.

<sup>20</sup> C-2013/15. Some technical problems have however been underlined by L. Woods, in 'Data retention and national law: the ECJ ruling in Joined Cases C-203/15 and C-698/15 *Tele2* and *Watson*', *EU Law Analysis*, 21 December 2016.

<sup>21</sup> 'More generally, the Court's analysis – by comparison with that of the Advocate General (AG) – was less detailed and structured, particularly about the meaning of necessity and proportionality. It did not directly address the points the AG made about lawfulness, with specific reference to reliance on codes (an essential feature of the UK arrangements); it did in passing note that the conditions for access to data should be binding within the domestic legal system. Is this implicit agreement with the AG on this point?'

<sup>21</sup> C-404/10 P.

they must be carefully used.<sup>22</sup> As a consequence, some consider it quite difficult to draw general conclusions for future similar operations.<sup>23</sup>

More recently, the 2017 headscarf judgment has followed the same balanced strategy.<sup>24</sup> Here, the Court of Justice distinguishes functions that imply contact with customers and others. For the first category, employers can forbid the use of religious symbols, but this must concern all of them, and must be established in a general and clear rule.

We are, in one word, in a period of prudent jurisprudence, for multiple reasons. The EU has changed. It has become much more heterogeneous. The Treaties have changed. The provisions have become more complex and detailed. EU regulations have multiplied. The EU has also become more unpopular. And the legitimacy of judicial power is much more contested than in the past (see what has happened in 2016 and 2017 in the United States, the United Kingdom, and France, for example).

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<sup>22</sup> C-62/14.

<sup>23</sup> See D. Adamski, 'Economic constitution of the euro area after the Gauweiler preliminary ruling', *Common Market Law Review*, 52, 2015, 1451-1490.

<sup>24</sup> C-157/15.

## 4. THE EU JURISPRUDENCE SUFFERS FROM OTHER PROBLEMS

Quite aside from activism, the reading of various national judgments and academic comments seems to reflect a growing problem linked to the weak explanations of a substantial number of ECJ judgments. Some confusion exists, however, between the two problems. Judgments that provide limited explanations can, as a matter of fact, generate a feeling of activism, because the judicial decisions' basis and impact remain uncertain. This, rather than activism, may explain the present malaise surrounding some ECJ judgments.

### 4.1. Limited explanations

A good illustration of limited explanations was long ago provided by the much-commented-upon admissibility debate concerning individual actions against general regulations. In 2002, the General Court (then Court of First Instance or CFI) had adopted its *Jego-Quere* judgment in favour of a broad admissibility.<sup>25</sup> AG Jacobs had dealt solidly with this question in his conclusions about the UPA case.<sup>26</sup> In its *Jego-Quere* appeal judgment, the ECJ maintained its restrictive approach. The argument was, however, described as 'circular':

As Jacobs AG observed ... there is nothing in the Treaty that dictates that the concept of individual concern should be interpreted so restrictively. ... What the Court views as an inescapable constraint imposed by the letter of the Treaty is in fact no more than a constraint imposed by its own preferred interpretation of the disposition.<sup>27</sup>

The debate went on in the *ECJ Regione Siciliana* judgment.<sup>28</sup> The General Court (then CFI) had adopted in different chambers first a restrictive inadmissibility order (under appeal) and then a more flexible judgment. The ECJ took this case in great chamber and then adopted similarly a very short judgment of 40 points, with only three paragraphs of legal reasoning. AG Colomer's conclusions offer a much more complete explanation about the possible interpretations at stake and their impact.

This is far from an exception. As Judge Lenaerts has indicated, in commenting, for example, on the *Zambrano* judgment, 'in contrast to the extensive opinion of AG

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<sup>25</sup> T-177/01.

<sup>26</sup> C-50/00 P.

<sup>27</sup> T. Tridimas and S. Poli, 'Locus standi of individuals under Article 230(4): the return of Euridice?', in *Continuity and Change in EU Law*, 2008, 81.

<sup>28</sup> C-417/04 P.

Sharpston, the ECJ's legal reasoning is contained in ten paragraphs, out of which only six concerned Article 20 TFEU'.<sup>29</sup> Sometimes the Court can even decide to eliminate all debate. AG Bobek gives as an example the 2007 Poland judgment concerning the admissibility of action against EU decisions, which was taken before the 2004 enlargement:<sup>30</sup>

AG Poiares Maduro spent 48 paragraphs (out of a 76-paragraphs long opinion) discussing, similarly as the Member States in their submissions, the issue of admissibility of the action. The Court did not address this issue at all. It simply stated in paragraph 33 of its judgment that "in the present case the Court considers it necessary to rule at the outset on the substance of the case".<sup>31</sup>

Taking another example, AG Bobek stresses that in the 2008 Cartesio judgment about the essential question of the possibility of appeals against national decisions submitting requests for preliminary rulings, even when the ECJ gives reasons, 'it is difficult to find any judicial reason in the sense of clear and above all transposable guidance for national courts'.<sup>32</sup>

While the time taken to determine reference for preliminary ruling has been reduced since 2000, it appears that the precision of the ECJ's reasoning has followed a similar decline. As Lenaerts emphasises, 'for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be ... As consensus-building requires bringing on board as many opinions as possible, the argumentative discourse of the ECJ is limited to the very essential'.<sup>33</sup> Though this presentation seems ambiguous (majority, not consensus, is required *stricto sensu*), this search seems in any case to have become substantially more difficult after the 2004/2007 enlargements, with 28 judges and rotating grand chambers.

## 4.2. Weak methodology

Observers often criticise less the ECJ's results than the method by which they are achieved. They consider that 'more often than not, some parts of its argumentative discourse are missing, have been skipped or jumped through'.<sup>34</sup> As Weiler summarises, 'especially in its constitutional jurisprudence, it is crucial that the ECJ demonstrates ... that national sensibilities were fully taken into account. And it must amply explain and reason its decisions if they are to be not only authoritarian, but also

<sup>29</sup> K. Lenaerts, 'The Court's outer and inner selves', in *Judging Europe's Judges*, Hart, 2013, 33.

<sup>30</sup> C-273/04.

<sup>31</sup> M. Bobek, 'Of feasibility and silent elephants: the legitimacy of the Court of Justice through the eyes of national courts', in *Judging Europe's Judges*, 206, note 29.

<sup>32</sup> *Ibid.*, 207.

<sup>33</sup> K. Lenaerts, 'The Court's outer and inner selves', in *Judging Europe's Judges*, Hart, 2013, 46.

<sup>34</sup> K. Lenaerts, 'The Court's outer and inner selves', in *Judging Europe's Judges*, Hart, 2013, 46.

authoritative’.<sup>35</sup> Another good observer, Weatherill, describes a part of the internal market jurisprudence as ‘a ramshackle compromise, stripped of principle and reflecting no more than the bare minimum on which the several judges can agree’.<sup>36</sup> According to him, quite a lot of judgments are ‘a circumloquacious statement of the result, rather than a reason for arriving at it’. These authors have reached the heart of the matter.

This weakness seems to afflict many important decisions. As an illustration, AG Mazak’s comments on Mangold seem illuminating. The Mangold judgment has been essential in establishing the role of general principles of law.<sup>37</sup> The objective of strengthening individual rights

is defeated on another front in so far as individuals can be burdened in their horizontal legal relations by obligations flowing from an unwritten, judicially created general principle, which makes it practically impossible for them to reasonably foresee the rights conferred and obligations imposed on them by the EU legal order. Mangold is therefore characterized at its core by a lack of legal certainty – in and of itself a constitutional principle of law – and at least of collateral damage to the constitutional attribution of powers within the EU legal order.<sup>38</sup>

The Zambrano judgment is another seminal case.<sup>39</sup> It concerns the non-discrimination principle established by Article 20 TFEU. For Weatherill, this judgment ‘makes no attempt to explain what is the substance of the right conferred’.<sup>40</sup> Hailbronner and Thym add that the judgment creates an opaque test, and, furthermore, the Court indicates neither how it fits with existing case law, nor the extent of its scope. They conclude: ‘A supreme court should behave more responsibly’<sup>41</sup>.

This criticism has been particularly intense regarding the famous 2007 Viking and Laval judgments about the conflict between free movement and social rights.<sup>42</sup> For Weatherill, their ambiguity is bound to create a deterrent effect on collective labour

<sup>35</sup> J. Weiler, ‘Epilogue: the Judicial after Nice’, in G. De Burda and J. Weiler eds., *The European Court of Justice*, Oxford University Press, 2001, 215.

Generally, the reading of the two brilliant contributions from Lenaerts and Weiler’s in *Judging Europe’s Judges* (an exceptional book) is to be strongly recommended as a general introduction. It contrasts, in a nutshell, two visions which consider the ECJ more or less ‘perfect’ on one side and ‘more authoritarian than authoritative’ on the other.

<sup>36</sup> S. Weatherill, ‘The Court’s Case Law on the internal market’, in *Judging Europe’s Judges*, Hart, 2013, 90.  
<sup>37</sup> C-144/04.

<sup>38</sup> J. Mazak and M. Moser, ‘Adjudication by reference to general principles of EU law: a second look at the Mangold case law’, in *Judging Europe’s Judges*, Hart, 2013, 85.

<sup>39</sup> C-34/09.

<sup>40</sup> S. Weatherill, ‘The Court’s case law on the internal market’, in *Judging Europe’s Judges*, Hart, 2013, 99.

<sup>41</sup> K. Hailbronner and D. Thym, ‘Annotation of case C-34/09’, *Common Market Law Review*, 48 (4) 2011, 1259.

<sup>42</sup> C-438 and 341/05.



action, and he links this directly to the opacity of the reasoning and the lack of coherence with previous jurisprudence.

The Court has stumbled into the shaping of collective labour law and policy, an area in which it has little expertise and in which it has adopted a test which significantly favours corporate interests over worker protection. Disturbingly the Court did not follow the model regularly preferred in its earlier case law pitting economic against social and political fundamental rights which arose outside the context of labour disputes ... This has then an impact on the general coherence of the jurisprudence, and the Court's (and the EU's) legitimacy. The Court has adopted a broad approach of the EU law scope but at the stage of justification leaves wholly out of account any margin of appreciation apt to permit recognition of national circumstances. This seems inconsistent with previous practice and leaves the ruling vulnerable to the accusation that its intrusive nature strains the Court's legitimacy – both by the permitted scope of collective labour action in the EU and, the institutional consequence, by establishing obligations under an interpretation of the Treaty which has the effect of disabling the EU political process from choosing a different (re-regulatory) solution under secondary legislation.<sup>43</sup>

This analysis has been repeated in various ways by other observers.<sup>44</sup> This seems to illustrate how weak explanations create an impression of judicial activism.

Interestingly, a similar conclusion emerges from many strong analyses of the jurisprudence concerning citizenship. Hailbronner has criticised the Court's first approaches for their 'dogmatic inconsistencies'.<sup>45</sup> More recently, Thym has underlined the persistence of problems, and the extremely weak legal security: 'When it comes to social benefits, we are uncertain about the role of personal circumstances

<sup>43</sup> Ibid., 107.

<sup>44</sup> For Barnard, 'in the (in)famous 2007 cases of Viking and Laval, the economic interests of migrant companies were seen to prevail over the social interests of (some groups of) workers. The Court did recognize in these cases that the right to take collective action, including the right to strike, was a fundamental right, and that the social interests of trade unions to call their members out on strike had to be balanced against the economic interests of the employers. However, the Court's actual approach, based on the standard internal market case law (namely the Sager market access approach, the main analytical tool used at the time), in fact favoured employers. The Court easily found that the collective action constituted a restriction on free movement and so breached Articles 49 and 56 TFEU. This forced the defendant trade unions not only to show that the strike action was justified (on a limited range of grounds) but was also proportionate. This resulted in the paradox that the more successful the strike action, the less likely it would be proportionate' (C. Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future', *Current Legal Problems*, 67 (1) 2014, 199, 205.)

For Ronnmar, 'Viking and Laval have been interpreted as putting fundamental Treaty freedoms and economic integration first, and trade union rights and social integration, second. The Laval, Rüffert and Commission v Luxembourg case law also clarified that the Posted Workers Directive establishes only a minimum protection of a nucleus of mandatory rules, and does not provide for equal treatment of domestic and foreign employers' (M. Ronnmar, *EU Labour Law in Flux – Hard, Soft or Fundamental?*, 2016, 6.)

<sup>45</sup> K. Hailbronner, 'Union citizenship and access to social benefits', *Common Market Law Review*, 42, 2000, 1245.

and indirect judicial review. Recent judgments often lack coherence and clarity. As a result, it has become difficult to predict the outcome of social benefits cases – and sometimes one cannot even be sure of the successful party after the ruling has been delivered.<sup>46</sup> As a consequence of all these weaknesses, Dougan indicates that, ‘in the battle between competing suppositions, it seems that those favouring the individual will often trump those designed to protect the public interest, so that the nature as well as the burden of proof in free movement cases conspires against the collective aspects of social security’.<sup>47</sup>

Similar comments have been made about the ECJ OMT judgment. For Baroncelli, for example,

in sum, the reason put forward by the Court of Justice to justify the mandate for the ECB and its OMT programme, in order to maintain a good functioning monetary policy, seems to be based more on formal and tautological explanations than on substantive ones. In order to obtain a more detailed perspective on the issue, we should turn to the Opinion of Advocate General Cruz Villalón. The Advocate General mentions the concepts of ECB functional and organic independence, and links these institutional features to the principal goal of the ECB – ensuring price stability – and to the ‘almost constitutional character’ of the Statute of the ESCB and the ECB, which is very difficult to amend, something which differentiates the ECB from most central banks.<sup>48</sup>

This criticism about limited explanations has resurfaced recently in other domains. In 2017, for example, the ECJ adopted one important judgment about headscarves in enterprises.<sup>49</sup> This judgment has swiftly been criticised because ‘it fails to examine the proper balance between the desire of the employee to manifest her religious belief and the employer’s wish of a neutral workplace environment’ and did not answer the questions raised by AG Kokott. The author concludes: ‘the reasoning of the Grand Chamber, and the way in which it weighs the various relevant elements, remains implicit at best – but perhaps is simply incomplete. This is problematic in such an important case.’<sup>50</sup> For another author, ‘the ECJ on the other hand does not even mention the applicant’s religious freedom or the importance of the headscarf for her. It is hard to accept that the ECJ has genuinely conducted a proportionality

<sup>46</sup> D. Thym, ‘Towards real citizenship? The judicial construction of Union citizenship and its limits’, in *Judging Europe’s Judges*, 163.

<sup>47</sup> M. Dougan, ‘The bubble that burst: exploring the legitimacy of the case law on the free movement of Union citizens’, in *Judging Europe’s Judges*, 37.

<sup>48</sup> S. Baroncelli, ‘The Gauweiler judgment in view of the case law of the European Court of justice on European Central Bank independence – Between Substance and Form’, *Maastricht Journal of European and Comparative Law*, 23 (1) 2016, 79.

<sup>49</sup> C-157/15.

<sup>50</sup> M. Stijns, ‘Achbita and Bougnaoui: raising more questions than answers’, *Eutopia Law*, 17 March 2017.

assessment if the judgment does not show any evidence of the weight that is attributed to the interests on one side of the balance.<sup>51</sup>

Other comments insist again that this is less a problem of result than of deficient technique.<sup>52</sup> ‘The Court chose a different path and that is, of course, within its prerogatives. However, the way that path was trodden upon leaves many open questions both in relation to the way the result was achieved, and to the many questions it overlooks.’<sup>53</sup> Furthermore, ‘as a contribution to legal thinking it is incoherent and unprincipled, but nevertheless perhaps worthwhile: for sometimes it takes an explicit statement of the orthodoxy to reveal quite how hollow it is’.<sup>54</sup>

Another recent judgment concerned the Member States’ obligation to issue a visa to persons seeking refugee status who were at risk of ill treatment. Criticism, of course, is a part of the game. But here again this judgment is criticised because it did not address the extraterritorial application of the Charter of Fundamental Rights, a problem emphasised in AG Mengozzi’s conclusions. Additionally, it was pointed out that the referring judge had explicitly raised this question. For Brouwer, the Court doing so was ‘protecting the Dublin system rather than refugees’.<sup>55</sup>

In another essential domain, and again in connection with fundamental rights, one can usefully compare the opinion of AG Jaskinnen and the judgment of the ECJ in *Google Spain*.<sup>56</sup> The right to be forgotten is certainly an essential issue in the information society. AG Jaskinnen recommended a precise examination of the whole-internet actors on one side, and the different applicable human rights on the other. It was a most careful and global approach. The ECJ did not follow it, however, and did not explain why. The consequences have been incisively described by Kuner:

the Court emphasizes the right of individuals to remove their personal data from the results generated by search engines, but barely mentions the right to freedom of expression, and never refers at all to Article 11 of the Charter of Fundamental Rights. It also states (par. 81) that the right to data protection generally overrides the interest of the general public in finding information relating to a data subject’s name, while at the same time stating that the

<sup>51</sup> E. Brems, ‘Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace’, IACL-AIDC, 25 March 2017.

Incidentally, the author also criticises ‘the ivory tower mentality’ of the ECJ and underlines the absence of a single ‘reference to either the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress.’ She even criticises the judgment’s reading in Dutch by ECJ President Lenaerts, substituting Islamist for Islamic, which is far from a minor change.

<sup>52</sup> R. McCrea, ‘Faith at work: the CJEU’s headscarf rulings’, *EU Law Analysis*, 17 March 2017.

<sup>53</sup> E. Spaventa, ‘What is the point of minimum harmonization of fundamental rights? Some further reflections on the *Achbita* case’, *European Area of Freedom Security & Justice*, 21 March 2017.

<sup>54</sup> G. Davies, ‘*Achbita* v G4S: Religious Equality Squeezed between Profit and Prejudice’, *European Law Blog*, 6 April 2017.

<sup>55</sup> E. Brouwer, ‘The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?’, CEPS, 16 March 2017.

<sup>56</sup> C-131/12.

balance between the two must depend on the specific case at issue. The judgment requires data controllers, data protection authorities, and courts to strike a ‘fair balance’ between these rights, but gives almost no criteria for doing so.<sup>57</sup>

These multiple uncertainties are often described as extremely costly for enterprises. The price of weak explanations is weak legal security.

Additionally, academic comments have also criticised weakly coordinated judgments. So, for example, Weatherill describes the Bonnarde judgment as ‘a decision of the fifth chamber and probably must be treated as a regrettably imprecisely written judgment, rather than an attempt to rewrite the law’.<sup>58</sup> The famous 2006 Viking and Laval judgments both dealt with the balance between freedom of services and social protection, and were adopted the same day. For observers, the Viking judgment appears neatly structured and reaches a balanced conclusion to be applied by the national judge, whereas the Laval judgment does not offer such a clear line. ‘In Laval, in contrast to Viking, the Court seemed to be more sensitive to the national and the community legal context and it applied a less structured proportionality’.<sup>59</sup>

Let’s pause for one minute and ponder the meaning of all this. On the one hand, we find many criticisms on various matters, coming from many specialists, who without any coordination reach more or less the same conclusions on the ECJ’s want of competence and/or precision in a substantial number of judgments. On the other, for five years we had a debate about a fundamental reordering of the EU judicial system without paying a minute of attention to these various criticisms, without any impact assessment, and without any open consultation process. Such an approach appears to be very far removed from basic standards of good governance. The reform of the CJEU is in fact the absolute opposite of the daily propaganda presenting the EU as a model of openness, transparency, public consultation, and good management of public money.<sup>60</sup>

<sup>57</sup> C. Kuner, ‘The Court of Justice of EU’s Judgment on the ‘Right to be Forgotten’: An International Perspective’, EJIL Talk, 20 May 2014.

<sup>58</sup> Ibid., 96.

<sup>59</sup> Some describe this, for example, as an oscillation between two lines: see R. Zahn, ‘The Viking and Laval Cases in the Context of European Enlargement’, *Web Journal of Current Legal Issues*, 2008. A. Davies speaks about ‘One Step Forward, Two Steps Back?’, *Industrial Law Journal*, 2008. For N. Hos, ‘The principle of proportionality in the Viking and Laval Cases: An appropriate standard of judicial review?’, *EUI Papers*, 2009/6.

<sup>60</sup> For Judge A. Collins, this even opens the door to the extremist parties’ attacks against the EU: see ‘Cross-Border Justice in the EU and the Impact of Brexit’, Dublin, Ireland. 30 September 2016.

### 4.3. Criticised judgments

For decades, the ECJ had a very clear position on infringements of the unreasonable time principle, explained in the *Baustahlgewebe*, and later *Grüne Punkt* judgments.<sup>61</sup> People alleging unreasonable time by the General Court had to appeal in front of the ECJ. Suddenly, in 2014, in the *Gascogne* judgment, the Court completely changed its jurisprudence.<sup>62</sup> Henceforth it would examine the existence of such an illegal delay, although the plaintiffs themselves have to introduce a new independent damage action in front of the General Court, to examine the existence of a damage and a causal link. Some observers quickly stressed that the solution thus offered to a victim of a judicial procedure was to open another judicial procedure, which could also take years and more money. Additionally, for others, ‘this remedy runs counter to the principle of impartiality. The suggestion of the CJEU that a different composition of the General Court will assess the damage action (para 101) will not rebut the objective impression of partiality, which will not be removed when the composition of a court has been changed’. Furthermore, the ECJ was dividing the different conditions of responsibility between two different courts.<sup>63</sup> Interestingly, similar considerations against the reasons for the ECJ’s reversal of jurisprudence had also been defended by AG Wathelet.<sup>64</sup>

In a scathing comment, A. Scheidtmann added that

while the ECJ recognized the similarity of the *Gascogne* cases to the situation in the *Baustahlgewebe* judgment, it failed to explain its reasons for departing from the approach taken earlier in the *Baustahlgewebe* case. The alleged appropriateness of a damages claim cannot serve as an explanation, since that possibility had already existed at the time of the *Baustahlgewebe* precedent.<sup>65</sup>

This additional criticism is important. Again, the absence of an explanation can create the impression of activism.

In this case, the absence even led observers to speculate about other motivations. Some even suggested that the Court had modified its jurisprudence in relation to its legislative proposal to obtain the doubling of the General Court.<sup>66</sup> As noted by Alemanno and Pech,

<sup>61</sup> C-185/95 P and C-385/07 P.

<sup>62</sup> C-40/12.

<sup>63</sup> See, for example, ‘The recent landmark cases on the reasonable time requirement: Is the Court caught between Scylla and Charybdis?’, December 2013. (<http://europeanlawblog.eu/2013/12/09/the-recent-landmark-cases-on-the-reasonable-time-requirement-is-the-court-caught-between-scylla-and-charybdis/>).

<sup>64</sup> Opinion of AG Wathelet of 29 April 2014, Case C – 580/12 P – Guardian Industries Corp. and Guardian Europe Sàrl/Commission, paras. 106 et seq.

<sup>65</sup> ‘Haste Makes Waste (?) – Some Reflections on the European Court of Justice’s Approach to Remedying Infringements of the General Court regarding the Right to be Heard Within a Reasonable Time’, *Competition Policy International*, 2014.

<sup>66</sup> D. Seytre, *Le Jeudi*, 1 December 2016.

The timing of the Gascogne line of cases offered the CJ an additional justification to convince the EU's co-legislators of the urgency of its reform, and its relatively minor costs (€ 28m) when viewed in the light of the potential cost of the then pending claims for damages. One may be forgiven for concluding that the CJ, *acting in its judicial capacity*, might have compounded the very problem that it had raised, *acting in its legislative capacity*, to convince the Parliament and Council of its reform package. (underlining by the authors)

In any case, the enterprises duly introduced new damages action before the General Court. The ECJ, as defendant, claimed that the action was inadmissible on the grounds that it ought to have been commenced against the Commission. The General Court duly rejected that argument by way of reasoned order, emphasising, among many other arguments, that Article 335 TFEU was quite clear, and also that the CJEU had included credits in its budget to cover such possible costs.<sup>67</sup> The ECJ then proceeded to bring an appeal against this order before itself.<sup>68</sup> This surprised other observers.<sup>69</sup> After less than a year, this appeal was finally withdrawn. Both the introduction of the appeal and its withdrawal were made without any explanation, notwithstanding the extremely unusual nature of the procedure.

In its pleadings, the ECJ contested that it was liable for any damages. This led some lawyers to compare with irony the strongly contradictory arguments the ECJ had made in the legislative procedure to double the number of judges at the General Court, where it had emphasised that the costs of increasing the number of judges were very limited in comparison with the potential liability of tens of millions of euros arising from damages actions for delays in the duration of proceedings. Furthermore, as defendant, the ECJ denied the existence of any unreasonable delay, although it had found as a court that such a delay existed in its Gascogne judgment.<sup>70</sup> Some lawyers who were involved even described the whole as 'legal banditry'.<sup>71</sup>

At the beginning of 2017, the General Court finally adopted a new Gascogne judgment against the CJEU<sup>72</sup> and awarded damages at 57,000 euros. The ECJ then once more brought an appeal against this judgment before itself.<sup>73</sup>

<sup>67</sup> Order 2 February 2015, T-577/14. Amazingly, the order, in spite of its fundamental implications, has never been translated into any language other than French.

<sup>68</sup> C-71/15 P.

<sup>69</sup> Jones Day, 'EU Court of Justice Battles with Itself on Delays at the General Court', April 2015.

<sup>70</sup> For more comments, see A. Alemanno and L. Pech, *op.cit.*, p. 156. The ECJ's position as a defendant was summarised in *Rapport d'audience* in Case T-577/14 (quoted by these authors).

<sup>71</sup> D. Seytre, 'Mais c'est du banditisme juridique!', *Le Jeudi*, 14 July 2016.

<sup>72</sup> 10 January 2017, T-577/14.

<sup>73</sup> C-138/17 P.

Many things are surprising in this affair. For example, appeals by or against the Commission are presented as such (C-584/10P), and so are those by or against the Council (see, for example, C-104/16P) or the Parliament (C-583/11P). However appeals by the ECJ in front of itself are presented by its own website as 'European Union v. Gascogne' (C-138/17P), which makes them more difficult to detect.

Let's pause again for one minute to ponder the meaning of all this, and the reactions provoked by these events. We have here a court which changed its jurisprudence in the midst of a related legislative procedure that it had itself launched. We have a solution to compensate for unreasonable judicial delays that increases both the length of proceedings and their costs very substantially for enterprises. We have a court that, as defender, brings appeals before itself when its financial interests are directly involved against those of enterprises, which can create a public relations problem. So, in this exceptional constitutional story, the Court is mentioned successively as a court, as an administrative authority, as a defender, and as a legislative authority. Again, with very limited explanations, such episodes may create the feeling of activism. They are also not necessarily positive for the institution's image. This, among other signs, is reflected by the European Parliament's recommendation, in its resolution of 29 April 2015, 'that the institution be reorganised in such a way as to make a clearer separation between legal and administrative functions, thus bringing the setup more closely in line with Article 6 of the European Convention on Human Rights so that judges no longer run the risk of having to rule on appeals against acts in which their authorities have been directly involved'.

#### **4.4. Reactions from national courts**

Last but not least, some recent ECJ judgments have provoked rather strong reactions from national courts.

First, in 2015, the ECJ delivered the famous OMT judgment on the controversial operations of the ECB.<sup>74</sup> This prejudicial ruling on questions posed by the German Constitutional Court endorses the OMT mechanism. For observers, as we have seen, the explanations remain limited, especially those concerning the absolutely exceptional context of 2012. The cumulative states/banks crisis of 2012 was a remake of the financial crisis of 2008, itself a remake of the 1929 crisis. This approach did not increase the judgment's acceptability, especially in some German quarters. So the German Constitutional Court's 2016 judgment explicitly criticises the way the ECJ judicially reviews acts of the ECB.<sup>75</sup> It has a long tradition of doing so, but here it is not alone. Let's, for example, remember Baroncelli's synthesis, mentioned above, which describes this judgment as tautological explanations rather than substantive ones.<sup>76</sup>

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<sup>74</sup> C-62/14.

<sup>75</sup> Judgment of 21 June 2016 (2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13).

<sup>76</sup> S. Baroncelli, 'The Gauweiler judgment in view of the case law of the European Court of justice on European Central Bank independence – Between Substance and Form', *Maastricht Journal of European and Comparative Law*, 23 (1) 2016, 79.

Second, in 2015, the ECJ delivered its judgment in *Taricco*, where it considered that the extension of a time-limit (in the interest of the EU's financial interests) does not necessarily prejudice the criminal liability of the accused, because time limits are procedural rather than substantive in nature. This ruling has a fundamental impact on the criminal system, and for some critics it does not pay enough attention to fundamental rights.<sup>77</sup> In this context, it is hardly surprising that the Italian Constitutional Court has taken the unprecedented step of asking the ECJ to reconsider its judgment.<sup>78</sup>

Third, the Supreme Court of Denmark has gone further in its 2016 *Danske Industri* judgment.<sup>79</sup> In its *Association de Médiation Sociale* 2014 judgment, the ECJ had repeated its statements in *Mangold* about the effect of the Charter and general principles of law.<sup>80</sup> This case raised the issue of horizontal applicability in relation to Article 27 of the EU Charter of Fundamental Rights. This provision establishes the right of workers to information and consultation within the undertaking. The case thus concerned the interpretation of the Charter and, in particular, its application to disputes between private parties.<sup>81</sup> The judgment has also been criticised for its limited explanations.<sup>82</sup> One author even presents it as an additional example of 'the

<sup>77</sup> See, for example, D. Guimaraes, Analysis of the *Taricco* Judgement: The EU's Financial Interests Come First, *UNIO EU Law Blog*, 22 February 2016.

'On the other hand, the Court asserts that Italian law should be disapplied "without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure". Well, this raises important questions given the fact that such disapplication is contrary to the suspect's fundamental rights as they are recognized by their Constitution. The CJEU has already addressed a situation where national law provided more safeguards than European Law in the *Melloni* Judgement. At the time, the EU Law prevailed given the need to assure its effectiveness. With *Taricco*, such reasoning is clearly taken to a whole new level since the CJEU is now talking about substantive national criminal law.'

See also M. Lassalle, 'Taricco kills two birds with one stone for the sake of the PIF', *EU Law Blog*, 27 October 2017.

'While the AG made several propositions as to the method to reconcile Italian law and Italy's EU obligations (§ 124-127), the Court simply asserted that Italian law should be disapplied "without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure" (§ 49). This statement is very important for the very reason that such disapplication is contrary to the suspect's fundamental rights as they are recognized by the Italian constitutional system.'

<sup>78</sup> Order 24/2017.

See <http://www.giurcost.org/decisioni/2017/00240-17.html>, with numerous doctrinal references.

<sup>79</sup> Case 15/2014, Judgment 6 December 2016. <http://www.supremecourt.dk/supremecourt/nyheder/presse-meddelelser/Pages/>

The relationship between EU law and Danish law in a case concerning a salaried employee.aspx.

On this judgment, see M. Madsen, H. Olsen and U. Sadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation', University of Copenhagen Faculty of Law Research Paper No. 2017-32.

<sup>80</sup> C-105/14.

<sup>81</sup> See E. Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union', *European Constitutional Law Review*, 10 (2), 2014, 332.

<sup>82</sup> 'The AG had taken quite some care to integrate his proposal into the existing case law, and to provide a rather comprehensive solution to the various issues presented in the case. It is thus unfortunate that the Court decided to take a rather minimalistic approach to resolve the dispute which does not necessarily answer all that was on the table.' (B. Pirker, C-176/12 '*AMS*: Charter principles, subjective rights and the lack of horizontal direct effect of directives', *EU Law Blog*, 16 January 2014).



Court's inability to articulate how it is developing the law'.<sup>83</sup> In its *Dansk Industri* 2016 judgment, the ECJ answered questions from the Danish Supreme Court and invited it neatly 'to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age'.<sup>84</sup>

The Danish Supreme Court reacted by strictly interpreting the Accession Act of Denmark to the EU and concluding that unwritten general principles of EU Law are not binding in the Danish legal system. Again, this result is presented by various observers as the consequence of very limited explanations. Tellingly, this is also presented as a reaction against the ECJ's activism. For Sarmiento, for example,

the Court of Justice has stuck to its *Mangold* case-law quite firmly, but during this time it has hardly refined it or struggled to explain when it works and when it does not. The reasoning of *Association de Médiation Sociale*, where the Grand Chamber had the chance of explaining the limits of the *Mangold* case-law, was unanimously perceived as a disappointment. No wonder the Danish Supreme Court finds itself unimpressed when reading *Danske Industri*.<sup>85</sup>

Let's pause again, and ponder the meaning of all this. We have here three national supreme courts. In one year, the first one criticises the ECJ for its weak judicial review. The second asks the ECJ to reconsider its decision. And the third decides purely and simply to disregard the ECJ's judgment. These are huge events. Taken together their impact is considerable.

Of course, there are also brilliant judgments. For example, in the *ETS* in aviation judgment, the ECJ developed a strong analysis about the impact of customary international law, EU external agreements and extraterritorial application of EU law.<sup>86</sup> In the *Kadi II* judgment, the ECJ presented an excellent working instrument to manage freezing of assets.<sup>87</sup> Other examples could be found. However, there are, as seen earlier, quite a few problems.

They may also contribute to the fact that national judges sometimes hesitate to ask for preliminary rulings. Alternatively, they may need to send new questions to the ECJ after a first judgment is deemed insufficient.<sup>88</sup> Furthermore, as we have seen,

<sup>83</sup> 'Although the AG deals with these rules at length in his Opinion, the Court has chosen not to heed the call. It may be that the Court found it difficult to agree on either the outcome or the reasoning in this case. The result is a short and sparse judgment that offers little guidance for lawyers and litigants. If it is indeed a lack of consensus in the judiciary that is the cause then this field joins other fields of EU law, such as citizenship, in which the Court's inability to articulate how it is developing the law is becoming more problematic' (C. Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after *Association de Médiation Sociale*', *European Human Rights Review*, 2014).

<sup>84</sup> C-441/14.

<sup>85</sup> D. Sarmiento, 'An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course), Despite our differences', 1 February 2017.

<sup>86</sup> C-366/10.

<sup>87</sup> C-584/10P.

<sup>88</sup> See, for example, C-466/00.

observers underline regularly that the ECJ does not answer the national judges' questions.

Over the last decade, the ECJ has reduced considerably the time it takes to deliver judgments. Perhaps by way of compensation, it appears that some academic commentators and national courts have identified mounting problems in the quality of those judgments. Quite often, these problems seem related to the impact of the Charter of Fundamental Rights. It could be that the impact of this huge change in the Treaties was underestimated at the time by the institutions. Many of these problems also often seem related to the benign neglect of Advocates General's conclusions. Both questions would probably deserve more analysis. It is to be hoped that the academic world will pay attention to them.

Meanwhile, the very striking summary of De Burca echoes many other commentaries when she complains about 'the ECJ self-referential, formulaic and often minimalist style of reasoning' that is 'largely unconcerned about the external impact and influence of its rulings'.<sup>89</sup> Arnulf concludes that, compared with ECtHR, the German Constitutional Court or the UK Supreme Court, 'it is hard not to see the reasons often (if not always) given by the ECJ to support its judgments as inadequate to satisfy the requirements of legal certainty and the rule of law'.<sup>90</sup>

Other comments describe the ECJ behaving sometimes more like a judicial bureaucracy than a court. All EU institutions should reflect on this, open a debate, and listen carefully to external commentaries.<sup>91</sup>

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<sup>89</sup> G. De Burca, 'After the EU charter of fundamental Rights: the Court of justice as a Human rights adjudicator?', *Maastricht Journal of European and Comparative Law*, 20, 2013 168.

<sup>90</sup> A. Arnulf, 'Judicial activism and the ECJ: how should academics respond?', in M. Dawson, B. De Witte and E. Muir eds., *Judicial Activism at the European Court of Justice*, Elgar, 2013, 231.

<sup>91</sup> That's why the author felt it useful in his farewell speech to advise that the different EU courts should develop their abilities to inform in depth and to consult their various external partners regularly, especially in essential reforms of a constitutional nature. <http://eulawanalysis.blogspot.be/2016/10/eu-judge-dehousses-farewell-address-to.html>.

See also on this topic A. Alemanno and O. Stefan, 'Openness at the Court of Justice of the European Union: Toppling a taboo', *Common Market Law Review*, 51, 2014, 97-139

## 5. THE NEED FOR A NEW STRATEGY FOR THE EU JUDICIAL INSTITUTION

The EU is already encountering a great number of problems. A decrease in the technical legitimacy of the judgments delivered by the ECJ does not help in a general climate of contestation.<sup>92</sup> Some things should thus be done to address this – and they can be done.

### 5.1. A better use of Advocates General's conclusions

Firstly, we need better use of the instruments available to the ECJ. Here, greater emphasis ought to be placed on the Advocates General. Quite often, judgments can be divided into two categories. Some of them take into consideration the opinion of the Advocate General. It is not a call to the ECJ to follow the Advocate General's opinion in every case but rather to demonstrate that the ECJ takes it into account in delivering judgment. Other judgments give the impression that the opinion of the Advocate General barely exists. They are generally not the best ones.

This is essential for the legitimacy of judicial decision-making. Formally, justice must be debated, but must also be seen to be debated. Substantially, it is not enough to provide a solution; a precise and efficient explanation is also required. From that point of view, taking better account of Advocates General's opinions and responding to them would help litigants and national courts to understand the ECJ's reasoning. There have always been proposals to introduce concurring and dissenting opinions in the ECJ. This is unlikely to win favour, for two very simple reasons. As indicated by AG Jacobs, it risks imbuing the court's case-law with a strong national flavour.<sup>93</sup> Moreover, as long as the present appointment system is maintained, judges will be seen as the emanation of their Member State, an impression strongly intensified by concurring and dissenting opinions. In a context where judges need the support of their national governments to be reappointed, concurring and dissenting opinions may become a permanent part of reappointment campaigns. However, if taken seriously into consideration, Advocates General's opinions can offer a very useful (and maybe even more objective) substitute.<sup>94</sup> They remain necessary anyway for

<sup>92</sup> As recent headlines illustrate: 'Europe's imperial court is a threat to all our democracies', *The Telegraph*, 14 January 2015; D. Griem, 'Quand le juge dissout l'électeur', *Monde Diplomatique*, July 2017.

<sup>93</sup> F. Jacobs, 'Advocate Generals and Judges in the European Court of Justice', in D. O'Keeffe ed., *Judicial Review in European Union Law*, Kluwer, 2000.

<sup>94</sup> In N. Burrows and R. Greaves, *The Advocate General in EC Law*, Oxford University Press, 2007, the authors propose to suppress them. A prerequisite for such a strategy would be to guess what Member States will replace them with (an essential precaution in a strategy for constitutional reform). The author suspects the answer will please nobody, Messrs Burrows and Greaves included. Furthermore, this will re-open the Pandora's Box concerning the proper balance between Member States in the EU judicial system.

the reason underlined by AG Sharpston: ‘A Court operating with a Great Chamber and eight separate smaller chambers is more susceptible inadvertently to generate divergent strands of case law’.<sup>95</sup>

Advocates General are an essential instrument in improving the dialog between EU and national courts, even if they are not always seen as such (including in the ECJ). From this point of view, it is strongly regrettable that the ECJ is said to have decided according to some internal sources that Advocates General must partly assume judges’ duties and thus also draft judgments. If the information is confirmed, it does not reflect the primacy of quality. It can only reduce the precision and efficiency of legal debate inside and outside the institution.

A second improvement *rebus sic stantibus* would be a better use of the ICT instruments. The ECJ’s computing research instruments do not function optimally. Some references are regularly lost. Research instruments sometimes provide different results according to the language chosen. Furthermore, the development of ICT instruments has strongly modified the drafting of judgments by increasing its automaticity. Additionally, blocks of jurisprudence are now regularly imported from one judgment to another. This naturally tends in the institution to increase conservatism – and decrease criticism. All this deserves some more serious reflection. The absence of any ambitious academic research on such a fundamental topic is quite surprising.

## 5.2. A better use of ICT for greater productivity

ICT is also essential for the correct analysis of the CJEU’s productivity evolution. Until now, such an analysis has remained very limited. Year after year, the EU institutions only publish reports indicating that ‘the number of judicial cases has never been so high’. However, absolute numbers in themselves reflect absolutely nothing regarding productivity. On the contrary, they generate false perceptions. Firstly, one has to compare output with input, and thus the evolution of the workload with the evolution of resources. This explains occasional strong divergences of analysis. In 2017, for example, the General Court’s president declared that the number of applications was ‘exploding’. Mrs Seytre, a well-informed observer of the CJEU, presented a very different analysis. According to her, in 2003, the General Court had 15 judges and 30 legal secretaries, and received 466 applications. In 2004 and 2007, the General Court’s resources were globally doubled. It went from 15 to 27 judges, and from 30 to 81 legal secretaries (each cabinet received an additional legal secretary). In 2015, the EU institutions decided to double the General Court again. In 2016, there were already 44 judges and 132 legal secretaries. The conclusion was sharp: ‘in 13

<sup>95</sup> E. Sharpston, ‘The changing role of the advocate general’, in A. Arnulf, P. Eeckhout and T. Tridimas eds., *Continuity and Change in EU Law*, Oxford University Press, 2008, 33.

years, the number of cases has doubled, the number of judges tripled, and the number of legal secretaries quadrupled. If there is an explosion, isn't it in the personnel?'<sup>96</sup>

This debate also emphasises the need to take account of factors other than absolute numbers. First, the cases' workload tends to change. As far as the General Court is concerned, for example, as indicated by the same source, the number of very heavy competition cases has strongly diminished whereas the number of relatively light trademark cases has sharply risen.<sup>97</sup> This evolution tends to reduce the global workload. Furthermore, some cases are counted twice. For the General Court, for example, the annual report 2016 indicates that 103 new cases of a total of 974 concern special forms of procedure (judgments in summary proceedings, for example, which consist of a first summary examination of the arguments).

Finally, in the productivity evaluation, ICT investments should also be taken into consideration. The institution now invests annually more than 15 million euros in ICT. These improvements are meant to reduce the workload through the automatisisation of many administrative and analytic functions. Normally, this should help reduce the volume of personnel per case.

This has happened in some of the CJEU's administrative services. The productivity of the translation department (number of pages translated per personnel unit), for example, has substantially improved. However this certainly did not happen in the judges' cabinets. If we use Mrs Seytre's numbers, in 2003, a legal secretary was dealing with 15.5 cases per year; in 2016, the number had come down to 7.8 cases. This is very far from reflecting the diminution of the average workload per case, or the reduction of work brought by ICT investments, on the contrary. Here, the ECJ appears in fact an extreme illustration of the Solow paradox, where more and more ICT investment brings less and less productivity per personnel unit. This is the assessment that the European Parliament and the Council should have made before supporting the doubling of the General Court's cabinets. Instead, they seem to have been blind to basic management principles, in their shared eagerness to appoint as many judges as possible.<sup>98</sup> As Alemanno and Pech clearly demonstrate, the General Court had in fact largely reduced its backlog in 2015 without a single additional judge, but by employing many managerial measures.<sup>99</sup> In an apparent paradox, the results

<sup>96</sup> D. Seytre, 'Le Tribunal européen explose-t-il?', *Le Jeudi*, 11 May 2017.

<sup>97</sup> Ibid.

<sup>98</sup> For those who support a more enlightened management approach, see The reform of the EU courts I, § 4.1.1. The author had already emphasised in 2011 that, as the ECJ is the priority and cannot be enlarged, the first step of a rational strategy would have been to determine its optimal workload. The EU institutions did not pay any attention and did the complete opposite. They doubled the second layer without any serious assessment of the needs of the first layer. Most logically, it was finally discovered, four years later, that some transfers of competence should be organised from the first to the second one. But nobody knows what and how. See The reform of the EU courts II, § 5.1.1.

<sup>99</sup> A. Alemanno and L. Pech, 'Thinking outside the docket: a critical assessment of the reform of the EU's court system', *Common Market Law Review*, 54, 2017, 152-155.

in 2016 were worse, due to two factors: the brutal enlargement of the Court (which creates a lot of new organisational problems), and some Member States' obvious mismanagement of judges' appointments (which had a destabilising effect on numerous cabinets and chambers). This is precisely what the author predicted in 2011: 'Unlike the multiplication of bread and fish, there are few miracles to expect from a simple multiplication of judges.'<sup>100</sup>

### 5.3. A greater use of specialised courts

In a longer term perspective, there remains a need to reform in depth the EU judiciary to allow the ECJ to concentrate on the essential, i.e., provide clearer and more complete reasoning. In this context, there is of course a link between the institution's organisation and its performance. The perspective of a new reform will probably not enchant the ECJ's leadership. The legislative debate about the doubling of the number of judges at the General Court and the suppression of the Civil Service Tribunal has been long and controversial. However, the final result appeared far from convincing until now.<sup>101</sup>

The ECJ's proposal resulted in the suppression of recourse to the specialised courts envisaged by Article 257 TFEU. This was done despite their many advantages – quality, productivity, flexibility and reduced costs<sup>102</sup> – which are confirmed by the latest experience. According to the sources already mentioned, there are too many judges and legal secretaries, and too little work in the General Court. If the European Parliament and the Council had a serious vision of public spending, they ought to revisit the appointment of the nine additional judges still to come in 2019.

Simultaneously, the productivity per personnel unit is falling substantially<sup>103</sup>. This was to be expected. As Peter Drucker rightly underlines, the multiplication of information systems allows to reduce the number of managers, precisely because it allows them to process information much more efficiently. This applies to public as well as private structures. This is precisely how information systems can reduce costs. It requires however to improve and focus the management of human resources.

<sup>100</sup> F. Dehousse, The reform of the EU courts I, 37.

<sup>101</sup> See the excellent commentary, with numerous sources, of A. Alemanno and L. Pech, 'Thinking outside the docket: a critical assessment of the reform of the EU's court system', *Common Market Law Review*, 54, 2017, 129-176. See also D. Sarmiento, 'The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform', *Cambridge Yearbook of European Legal Studies*, 2017 (which underlines the need for new reforms).

<sup>102</sup> See F. Dehousse, The reform of the EU courts I, § 5.

<sup>103</sup> As indicated previously, in 2003, there were 15 judges, 30 legal secretaries and 466 new cases. After 2004 and 2007, there was in fact first a doubling of the General Court (from 15 to 27 judges, and from 30 to 81 legal secretaries). At that time, there was a sharp drop of productivity, which is the main cause of the 2010 backlog. In 2017, there are 47 judges and 141 legal secretaries. So the number of cases dealt with by a legal secretary has been more or less reduced by 50%. (D. Seytre, 'Le Tribunal européen explose-t-il?', *Le Jeudi*, 11 May 2017).

(Another) area that is affected when an organization focuses its data processing capacity on producing information is its structure. Almost immediately it becomes clear that both the number of management levels and the number of managers can be sharply cut. (...) Converting data into information thus requires knowledge. And knowledge, by definition, is specialized.<sup>104</sup>

Furthermore, according to some authors, there is a paradox in the ECJ's legislative strategy of hearing all appeals (which was presented as an essential objective in the suppression of the Civil Service Tribunal) while simultaneously searching for various ways to expedite them, which is hardly the best guarantee of quality.<sup>105</sup> If appeals are a serious matter, they deserve serious examination. Expediting them through filtering or having them analysed by an administrative service does not correctly reflect on their importance<sup>106</sup>. In that case, they hardly need to be kept at the level of the ECJ, and the EU would be better served by a structure of specialised courts, with the General Court dealing with many appeals.

A three-layer courts system would allow the ECJ to focus better on its core mission. It would avoid the multiplication of judges in the General Court, which could adjudicate on appeals from specialised courts. The development of specialised courts would allow targeted measures to be implemented. The appointment procedure of judges could be improved by reducing the Member States' role.<sup>107</sup> Various changes could then be contemplated. For example, a single mandate of nine years could be introduced. This would certainly improve the judges' independence (and even allow concurring and dissenting opinions if desired). The number of judges in the specialised courts could be increased or decreased according to objective needs (rather than creating a new line up of 28 additional General Court judges for each time of need, which is extremely costly). More flexible procedural rules could be introduced.

<sup>104</sup> P. Drucker, *The New Realities*, Mandarin, 1989, 202.

<sup>105</sup> As underlined by Judge M. van der Woude, a thorough analysis of appeals is essential for the quality of judicial protection (M. van der Woude, 'In favour of effective judicial protection: A reminder of the 1988 objectives', *Concurrences*, 4/2014, 1). This is also evoked by Judge A. Collins, 'The General Court: Enlargement or Reform?', King's College Annual Law Conference, 11 March 2016. (<http://www.kcl.ac.uk/law/research/centres/european/index.aspx>).

<sup>106</sup> See various documents quoted in F. Dehousse, *The reform of EU courts II*, § 5.3.1.

<sup>107</sup> The 2016 renewal has again proved quite catastrophic for productivity. Many judges were not renewed. Additionally, some judges waited months for the national decisions. The negative opinions of the Article 255 TFEU panel sometimes make the paralysis period longer. Many months of work are lost in transition. As no commitments can be taken, files are blocked. In 2011, the author compared the General Court to an airport where many passengers wait regularly for delayed planes (*The reform of EU courts I*, 21). He did not know at the time that he would become the best illustration of his own analysis. For the 2016 renewal, the Member States were officially invited to present candidates in March 2015. The author was never contacted by the Belgian government, never informed by it about any procedure or decision, never given any reasoning. The government refused for two years – 24 months – to provide any answer (positive or negative) to various questions from the institution, Members of Parliament, the press ... or the author himself, or to organise any evaluation process, before taking its final decision. In July 2017, there was still a (Polish) judge in the General Court who had been neither reappointed, nor replaced, in 2016. Since September 2016, the General Court has not known what is to be done with her cases.

Furthermore, this would allow for a much needed professionalisation of EU justice.<sup>108</sup>

The fact that all these aspects were not debated in the 2011-2016 legislative procedures reflects the need to improve them. In that regard, this confirms that the ECJ's initiative right (which is a half-monopoly, in fact) for the legislative revision of the statute should be abolished. This exorbitant privilege exists in no Member State. It creates various technical problems.<sup>109</sup> More fundamentally, as Weiler has already emphasised, 'the domination of the reform agenda by the European Court itself compromises the critical foundation of any reform agenda'.<sup>110</sup>

To conclude, the mounting protests from various national courts (and the regular ones from the academic world) confirm that the ECJ should focus better on its core business, i.e., constitutional debates (notably the application of the Charter of Fundamental Rights). For this, the EU needs to return to the smart design of the Nice Treaty.

The CJEU was one of the most innovative features of the EC Treaties, and one of the most important changes in international law during the second half of the twentieth century. It has played an essential role in the past, and strongly contributed to the development of the rule of law in Europe. It is, however, now time to adapt in some aspects. In this regard, two essential elements should be taken into consideration.

First, many things have changed, and the recipes of the past no longer suffice. More efforts are required to deal with the new role of the Charter of Fundamental Rights. The impact of computers and data on the functioning of justice requires greater attention. Furthermore, the institution's management would also benefit from some modernisation. Transparency in administrative and, especially, legislative matters, must be fully applied in the European Court of Justice.<sup>111</sup> As Peter Drucker concluded,

Any organization, whether biological or social, needs to change its basic structure if it significantly changes its size. Any organization that doubles or triples in size [which is precisely what happened to the CJEU] needs to be *restructured* (emphasis by Drucker). Similarly any organization, whether a business, a non-profit or a governmental agency needs to rethink itself one it is more than forty of fifty years old. It has outgrown its policies and its rules or behaviour.<sup>112</sup>

<sup>108</sup> The suppression of the Civil Service Tribunal has been a mistake in many regards. The Court of Justice had repeatedly emphasised its high productivity and its strong added value for the coherence and coherence of the jurisprudence. See The reform of the EU courts I, § 4.1.1.

<sup>109</sup> The reform of the EU courts II, § 6.

<sup>110</sup> J. Weiler, 'Epilogue: Judging the judges – Apology and critique', in *Judging Europe's Judges*, 252.

The natural conclusion of this would be to suppress the legislative initiative right of the ECJ (see The reform of the EU courts II, § 6.5). The ECJ's president himself also concluded that such a system was in contradiction with the separation of powers principle (see The reform of the EU courts II, note 144).

<sup>111</sup> See A. Alemanno and O. Stefan, 'Openness at the Court of Justice of the European Union: Toppling a taboo', *Common Market Law Review*, 51, 2014, 97-139.

<sup>112</sup> P. Drucker, *Managing in a Time of Great Change*, Penguin, 1995, 290.



Additionally, with an extreme accumulation of powers comes an extreme need for caution. Probably no court in the world enjoys cumulatively so many judicial roles, an extreme administrative autonomy, and a half-monopoly in legislative initiatives on the judiciary. This requires exceptional precautions, otherwise the institution can be perceived as uncontrolled ... and even activist.

Second, there is a need to open an in-depth debate about the future of the EU judicial system. In 2011, some Member States proposed the creation of a reflection group formed of external experts from various surroundings. This should be revisited. The ECJ has announced a new legislative initiative. It should be more transparent and more participative than the previous one. The multiplication of judges in a strongly intergovernmental, bureaucratic, and unstable structure must be abandoned for more efficient solutions. A serious impact assessment should be realised, in due time, by independent experts, of the costs and benefits of all available solutions. The fact that this was not done for such a significant change (and expenditure) as the doubling of a court does not bring credit to the EU. The EU judiciary deserves better, and so do EU citizens.